

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.770 OF 1987

The State of Maharashtra)..Appellant

Versus

1. Javed Sultan Bakhtawar Khan)
2. Javed Khan Kamarkhan)
3. Hardeo Singh Malsingh, Aujla)
4. Shabbir Ahmed Khan Raisuddin Khan)
5. Mohd. Shafiq Mohd. Kasam Shaikh)
6. Shamim (since deceased))..Respondents

Mr.B.H.Mehta, APP for Appellant

None for respondents.

CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.

DATE : 18TH FEBRAURY, 2005.

ORAL JUDGMENT : (Per Kakade, J.)

1. This is an appeal preferred by the State against the judgment and order dated 11th May 1987 passed by the Additional Sessions Judge, Greater Mumbai wherein accused persons were acquitted of some charges levelled against them, while were convicted on certain different counts. This appeal has come against the order so far acquittal of the respondents is concerned. The respondents were prosecuted for commission of the offence punishable under Section 120-B, 395 r/w Section 397 and 395 r/w Section 379 and 411 of the Indian Penal Code. Accused No.1 was convicted under Section 411 of the Indian Penal Code and was sentenced to suffer R.I. for two years, however, was acquitted in respect of all other charges levelled against him. Accused No.3 was convicted for offence punishable under Section 379 and was sentenced to suffer R.I for two years and six months. He was also convicted for offence punishable under section 411 of I.P.C. and was sentenced to suffer R.I. for two years. He was however acquitted of all other charges levelled against him. Accused No.4 was convicted under Section 379 of I.P.C. and sentenced to suffer R.I. for two years and six months. However, he

was acquitted of all other charges levelled against him. The accused Nos.2 and 5 were acquitted of all charges levelled against them and set at liberty by the Trial Judge. In other words, all the accused persons were acquitted for commission of offence punishable under sections 120-B, 395 r/w 397 and 396 r/w Sec.34 of the Indian Penal Code. Some of the respondents had also preferred appeals against their conviction, however, those appeals were dismissed for non-prosecution by order dated 10th June, 1993 by this Court.

2. The prosecution story in brief is, thus -

. Between 3.1.1984 and 10.1.1984, respondent Nos. 1 to 5 and absconding respondent No. 6-Shamim, agreed to do illegal acts i.e. to commit theft of Motor Car, to use the same for the purpose of committing dacoity and to commit dacoity with deadly weapons i.e. revolvers. P.W.1 Monish Gupta was residing at Sodah Sadan, Scheme No.57, Road No.7, Wadala, Bombay -31. It appears that his wife Mrs.Jaya Gupta was a partner in Ashland Plastic Private Ltd. and hence the car MMF 2061 was in the name of the said company. It is further seen that P.W.1 Monish Gupta and his wife Jaya were using the

said car. The said car was usually parked in front of Sodah Sadan in a bye-lane of Scheme No.57, Road No.7, Wadala, Bombay. The said P.W.1 Gupta used to be in possession of the said car. On 3.1.1984 the car was parked at the aforesaid place at about 11.45 p.m. and it was properly locked. This car was fitted with a stereo of Sanyo make. It was also fitted with a fan and the stereo with two speakers. On 4.1.1984 at about 7.30 a.m. P.W.1 Monish Gupta found that the car was not on the spot and was missing. Hence at about 8.30 a.m. he went to Matunga Police Station and lodged a report. On the basis of the said report P.S.I. Chandanshive registered the offence under Section 397 of the Indian Penal Code vide C.R.No.15 of 1984.

. P.W.2 Subanna Shetty has his own hotel "Ambika Udipi Refreshment" at M.G. Road, Ghatkopar. On 10.1.1984 he had cash of Rs.25,700/= with him for the purpose of paying salaries to his servants in his hotel. He had kept that amount in his briefcase of Echolac Company. It is further seen that he had kept some other documents in the said bag. On the same day at about 10.00 p.m., he closed the hotel and came out with that bag containing cash of Rs.25,700/= and documents such as

cheque book, pass-book and a letter. After he came out of the hotel, he kept the said bag under the steering wheel in front of his seat i.e. driver's seat. Then he sat in the car and started driving his car. He wanted to go to his resident at Shivaji Park, Dadar. As his car came on the road leading to Siddhivinayak Temple, one fiat car came from behind. After coming from his right side, that car cornered his own car. It appears that thereafter other car came ahead of his car and stopped in front of his car, with the result, he could not proceed further. Hence, he stopped his car. Upon this respondent Nos.1, 2, 4 and 5 got down from the fiat car. One person i.e. 5th man was at the wheel of the said car. After respondent Nos.1,2,4 and 5 got down from the said fiat car, respondent No.1 fired a shot in the air. Respondent no.1 threatened P.W.2 Subanna Shetty, who was in the car that in case he raised an alarm he will be shot at. Respondent No.1 pointed the pistol at him. Respondent No.2 was standing by his side and he opened the front right side door and entered in the car and then he opened the front left side door and snatched the writ watch of Seiko make which he had worn. Respondent Nos.4 and 5 were on the other side of the car. After peeping through the front door of the car

removed the Echolac Company bag containing cash and documents and at that time the respondent no.5 was standing by his side. Thus after removing the wrist watch and after taking away the bag containing cash and documents respondent Nos.1, 2, 4 and 5 went and sat in the said fiat car. It appears that when the wrist watch of P.W.2 Subanna Shetty was snatched the belt of the wrist watch was broken. After respondent nos.1, 2, 4 and 5 sat in the said fiat car, driver of the said fiat car drove the said car in full speed towards the Prabhadevi Road. Witness Subanna Shetty took his car in reverse and drove his car towards his house. He told his wife about the incident and then he went to Dadar Police Station and lodged his complaint. Offence was registered at C.R.No.12 of 1984 under Section 397 of the Indian Penal Code. The Police Control Room was duly informed about the incident. The investigating officer on the same day went to the scene of offence and prepared panchanama thereof. Statement of one Yadav, who was the Panshop owner at the nearby place was recorded. In the complaint the description of the culprits was given. However, the culprits could not be traced.

. P.W.3 Nirmalsing Saini, has his hotel "Deshmesh Punjab Hotel" at Wadia Estate, N.M.road, Bail Bazar, Kurla. On 11.1.1984 at about 11.00 a.m. respondent nos.3 and 4 had come to his hotel. There was a quarrel between respondent nos. 3 and 4 on the one side and some other person on the other side in the hotel. Respondent Nos.3 and 4 said to P.W. 3 Saini that they would return within 15 minutes and would show those persons. Consequently respondent nos.3 and 4 returned in a fiat car bearing No.MMF 2061. Each of the respondents were armed with heavy stick. Those persons started beating respondent nos.3 and 4. Witness Saini therefore, contacted Sahar Air Port Police Station. After some time police arrived there and seeing the police respondent nos.3 and 4 and those persons ran away. It is further seen that they left the car on the spot itself. P.S.I. Mahabali had come to that spot. He made enquiries on the spot and he came back to the Police Station and contacted the Police Control Room on telephone. He made enquiries on telephone with the Police Control Room to the effect that whether the car bearing No.MMF 2061 was concerning in any offence and the Police Control Room informed him that the said car was stolen from the area of Matunga Police Station.

Accordingly the said police station was informed and car was brought to Sahar Air Port Police Station. Matunga Police Station was thereafter informed about the entire happenings, as a result of which P.W.1 Monish Gupta was called at Matunga Police Station in the evening and he was told that the car was traced. He was sent to Sahar Police Station and identified his car. The car was taken in custody and subjected to investigation to find out finger prints etc.

. On 10.2.1984 at about 7.30 a.m. P.S.I. Patil attached to D.C.B. C.I.D. noticed respondent no.1 in a bye-lane in the southern side of Kalpana Talkies, Kurla and hence he arrested with the help of the staff. The search of the person of accused no.1 was taken in the presence of panchas and one factory made pistol was found with him. It appears that a separate case under Section 27 of the Arms Act was registered against the respondent no.1 in that connection. Respondent Nos. 2, 3 and 4 were arrested by Malvani Sub-Police Station and respondent No.5 was arrested by Azad Maidan Police Station. On 14.2.1984 respondent Nos.2, 3 and 4 were taken over by the D.C.B. C.I.D. from the custody of Jogeshwari Police Station for further investigation. In

the meantime it transpired that respondent nos.1 to 5 along with one more person were involved in the present case i.e. Dadar Police Station C.R.No.12 of 1984 and investigation commenced in that regard. The investigation in all the said C.R.s were completed, in which course seized articles were sent to C.A. for chemical analysis, whose report was duly received and is part of the record. The charge-sheet was sent to the court of law. The learned Magistrate committed the case to the Court of Sessions. The learned Trial Judge framed the charges against the respondent-accused persons for the impugned offences, which they pleaded not guilty. The defence of the accused persons was that of total denial of any criminal liability. The learned trial judge proceeded to record the evidence of the prosecution witnesses and came to the conclusion on the basis of the said evidence that the prosecution had succeeded in establishing the guilt of the accused nos. 1, 3 and 4 instead of offences punishable under Section 379 as well as 411 of the Indian Penal Code. However, the other charges were held not proved for want of sufficient evidence. Accused Nos.2 and 5 were acquitted all the charges levelled against them. Hence the present appeal so far as order of acquittal passed by

the learned trial judge is concerned.

3. We have heard the learned APP for the State. None appeared for the respondents. We have also categorically perused the entire evidence on record with the assistance of the learned APP.

4. At the outset it may be noted that, as referred to earlier, the accused no.1 was convicted only for the commission of the offence under Section 411 of the Indian Penal Code and was acquitted of all the charges, whereas accused no.3 was convicted of the offence under Section 379 as well as 411 of the Indian Penal Code and was acquitted regarding other charges. Similarly respondent no.4 was convicted for offence under Section 379 and was acquitted so far as other charges were concerned whereas accused Nos.2 and 5 were acquitted of all the charges. Perusal of the entire evidence on record shows that the entire prosecution case is based on as many as 10 pieces of circumstantial evidence, those are as follows :

(i) Theft of car MMF 2061 between 3.1.1984 & 4.1.1984 from the possession of P.W.1 - Monish

Gupta. The said car was fitted with Stereo of Sanyo make Company, fan and the said Stereo had two speakers.

(ii) On 10.1.1984 the same car i.e. MMF 2061 was used by accused Nos.1 to 5 for the purpose of committing dacoity and dacoity was committed i.e. accused nos.1 to 5 conjointly committed robbery on S.K.Bhole Road, Dadar and robbed P.W. 2 Subanna Shetty of his Echolac bag containing cash of Rs.25,700/=, pass book, check book, and letter etc. and also he was robbed of his wrist watch of Seiko Company which he had worn.

(iii) Accused Nos.1 to 5 were put up in an identification parade held by S.E.M. Mulye (P.W.9) on 18.2.1984 and from that parade P.W.2 Subanna Shetty identified Accused Nos.1, 2, 4 and 5 as the persons who committed robbery.

(iv) On 11.1.1984 accused Nos.3 and 4 had a quarrel with some persons in Hotel 'Deshmesh Punjab Hotel' owned by P.W.3 Nirmalsing Saini and that accused nos.3 and 4 after some time

came in the same car No.MMF 2061 and quarrelled with those persons outside the hotel and on seeing the police, accused Nos. 3 and 4 abandoned the said car No. MMF-2061 near the said hotel and ran away, and those other persons also ran away.

(v) Car No.MMF 2061 was brought to the Sahar Air Port Police Station on the next day i.e. on 12.1.1984. This car was identified by P.W.1 Monish Gupta as his own and it was found that at that time the said car was damaged and the Stereo, two speakers and the fan of the car were missing. The panchanama regarding the condition of the car and regarding the chanceprints taken by Finger Print Expert was drawn.

(vi) P.W.1 Monish Gupta identified Art.1 Car Tape Recorder-cum-transistor as the same which was fitted in his car MMF 2061 which was stolen. He also identified two speakers Article 2 colly. as the two speakers of his car.

(vii) P.W. 2 Subanna Shetty identified

Article 3 bag as the same bag which the robbers removed from his car at the time of the incident in question. He also identified the inland letter marked "X" for identification (Article 4) as the same letter which he had received by post and which he had kept in the bag Art.3. He also identified Article 5 the wrist watch as his own and he says that it is the same which he had worn at the time of the robbery and which the robbers snatched it from his wrist. According to him the belt of the wrist watch which is seen fixed to wrist watch does not belong to him.

(viii) On 21.2.1984 accused no.1 made a statement before the police and the panchas, "I will show you the place where the number plate is. I will show the place where the bag is. I will also show the place where some parts of the car are. I will show the place where the number plate is". Accordingly, the memorandum was drawn, and further accused no.1 led the police and the panchas to the compound of S.S.Garage and from the heap of scrap material at that spot, he took out number plate, one bag

containing inland letter. He also took out one small Remy fan, four sheets covers and leather pouch containing some documents. All these articles were seized. Article 3 Echolac bag is the same which was taken out by accused no.1 from that heap and Article 4 is the same inland letter which was found in that bag.

(ix) On 30.3.1984 accused no.3 said to the Police and the panchas that he would show the place where two speakers, Sanyo Car tape and wrist watch were kept and he would show that place and accordingly the memorandum was drawn. Accused No.3 led the police and the panchas to room no.6 in Sonawane Chawl No.23, Hariyalli Village, near Vikhroli and took out a cloth bag which was under the cot and the said bag contained wrist watch, Sanyo car tape and two speakers and all these articles were seized. Article 1 Sanyo Car tape recorder, Article 2 colly. two speakers and Article 5 Seiko wrist watch are the same articles which were seized.

(x) The Commissioner of Police, Greater

Bombay issued an order under Section 37(1) of the Bombay Police Act, 1959 prohibiting to carry the arms and this order was published in the gazette No.30/LW dated 27.12.1983 Exh.49 and further the said order was promulgated within one or two days after 23.12.1983 in the area of Dadar Police Station.

. As can be seen from the entire evidence on record the theft of the car is duly proved and there is no dispute in that regard. Also the fact that the said stolen car was used for commission of theft of the amount of Rs.25,700/= from P.W.2 Subanna Shetty cannot be doubted. Further it has also been proved and duly established that the briefcase of Echolac Company was robbed at the same time and place. However, it is seen from the entire evidence that identification of the accused persons by P.W.2 Subanna Shetty appears to be doubtful. The identification parade held in that regard also does not inspire confidence and therefore as a matter of abundant precaution evidence of P.W.2 has to be discarded to that extent. In the course of his evidence he has described the incident and he has stated that there were five persons in all. However, in his

FIR he mentioned that there were six persons. Then it is not stated in the FIR that one person threatened him that in case he raised any alarm, he would be finished. Moreover, if we scrutinise his evidence pertaining to the identity of the accused persons it seems that it was quite improbable. The reasoning adopted by the learned trial judge in that regard appears to be correct while he has held that identification of the culprits at the hands of P.W.2 Subanna Shetty at the same time was not at all probable. Similarly the entire evidence with regard to the identification parade appears to be haphazard and cannot be sufficient to inspire confidence, and therefore, it seems to have been discarded rightly by the learned trial judge.

5. So far as articles stolen in this case are concerned, the car as well as the wrist watch are identified by the concerned witnesses. P.W.2 also identified wrist watch and bag wherefrom the amount was stolen. The recovery evidence at the instance of accused no.1 pertaining to hiding of original number plate and some of the parts of the car is however acceptable, as can be seen on its scrutiny. One Remy fan, four sheet covers and leather pouch containing some

documents were seized at his instance. Similarly accused No.3 led the police to recover Sanyo Car tape and two speakers and wrist watch where they were kept and therefore, the evidence regarding recovery of articles contemplated under Section 27 of the Evidence Act is sufficiently established that the said accused persons were linked with the said articles and therefore, it appears that the learned trial judge has rightly convicted the accused No.1 under Section 411 of the Indian Penal Code and accused No.3 under section 379 as well as 411 of the Indian Penal Code.

. In other words, scrutiny of the evidence is sufficient to satisfy us that the learned trial Judge has rightly discarded the evidence regarding the identity of the accused at the relevant time of commission of offences, however, proper appreciation appears to have been made on the available evidence so as to bring home the guilt so far as accused Nos. 1, 3 and 4 are concerned. It is also seen that accused Nos. 2 and 5 are rightly acquitted for want of identification as well as absence of any recovery of property at their instance. In other words, their involvement in the said incident has not been established.

6. For the reasons recorded above, we hold that the reasoning adopted and findings recorded by the learned Trial Judge are seen to be just, legal and proper and therefore would brook no interference. In the result the appeal stands dismissed.

(R.M.S.Khandeparkar, J.)

(P.V.Kakade, J.)